

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Equal Employment Opportunity))	
Commission,)	
)	No. 3:23-cv-04984-JSC
Plaintiff,)	
)	
vs.)	San Francisco, California
)	March 28, 2024
Tesla, Inc.,)	10:36 a.m.
)	
Defendant.)	
)	

BEFORE: THE HONORABLE JACQUELINE SCOTT CORLEY, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TESLA, INC.'S MOTION TO STAY ALL PROCEEDINGS/

TESLA, INC.'S MOTION TO DISMISS EEOC'S COMPLAINT

Official Court Reporter:
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A-P-P-E-A-R-A-N-C-E-S

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P R O C E E D I N G S

COURTROOM DEPUTY: Calling civil action C 23-4984,
EEOC versus Tesla.

THE COURT: Who's ever going to argue can come up.

All right. Appearances, please.

MR. BAKER: Yes. Good morning, Your Honor. My name
is James Baker on behalf of the Equal Employment Opportunity
Commission.

Seated at the table is my colleague Kena Cador. And
if it would please the Court, my colleague will address any
questions or arguments concerning the second portion of Tesla's
motion to stay concerning the alleged failure to --

THE COURT: Okay. All right. Thank you.

MR. HILL: Good morning, Your Honor. My name is Tom
Hill. I'm with Holland & Knight. I'm here on behalf of
defendant Tesla. I'm up here because I assumed that the motion
to stay was what you want -- Your Honor might want to hear
first.

THE COURT: You are exactly right, because that's what
we have to do first.

MR. HILL: Okay.

THE COURT: And who do you have with you at counsel
table?

MR. HILL: My colleague here is Ray Cardozo with Reed
Smith, also here on behalf of defendant Tesla and prepared to

1 argue the motion to dismiss.

2 THE COURT: Okay. All right. So let's start with the
3 stay, and there is sort of two arguments, and the first is
4 Colorado River. And I think what we run smack into is Ernest
5 Bock, right, and the Ninth Circuit saying just last year that
6 whether -- that Colorado River's abstention, which, by the way,
7 is rare, extraordinary, presumption against, all doubts
8 resolved in favor of no stay, but it has to be that there is --
9 the state action and the federal action are sufficiently
10 parallel, such that the state action -- state proceedings will
11 fully resolve the federal case. And I don't see that here, how
12 that would be the case.

13 MR. HILL: Well, Your Honor, first of all, you're
14 right that the case law indicates that the Colorado River stay
15 doctrine is applied sparingly, but it is -- I mean, there are
16 numerous cases, and we've cited them, including two decisions
17 that Your Honor authored, the Goodin versus Vendley case, and
18 the Scottsdale Insurance Company versus Parmerlee case, in
19 which Colorado stays were granted, and, particularly, the
20 Goodin case, which we think is analytically very much on all
21 fours with this case.

22 But to address your specific question with regard to
23 Bock, frankly, Your Honor, we think that the EEOC has asked
24 more of the Bock case than it can possibly deliver. Bock is
25 not dispositive of this case. Bock makes expressly clear that

1 its holding turns on the particular facts of that case, and
2 that each Colorado River case must be evaluated pragmatically
3 based on its own particular facts.

4 Bock, for example, does not hold that the plaintiffs
5 in the parallel cases must be the same.

6 THE COURT: No, but there must -- but tell me how --

7 MR. HILL: Okay.

8 THE COURT: This is my question.

9 MR. HILL: Yes. Sure.

10 THE COURT: Just get to the nub of it. Tell me how
11 the state case, a resolution of the state case in any way, any
12 resolution, will resolve this federal case with this federal
13 plaintiff.

14 MR. HILL: Okay. CRD in the state case, which is now
15 set for trial in less than seven months, has proposed a two-
16 phase trial plan based on the Supreme Court's, the U.S. Supreme
17 Court's, model for litigating pattern and practice claims under
18 Title VII, under International Brotherhood of Teamsters versus
19 United States.

20 In phase one, CRD would pursue injunctive relief on
21 behalf of public interest by proving a pattern and practice of
22 race discrimination and harassment by Tesla.

23 In phase two, and assuming it prevails in phase one,
24 CRD would pursue individual relief, reinstatement, backpay,
25 compensatory and punitive damages, on behalf of victims of

1 Tesla's misconduct.

2 Assuming the process plays out the way CRD, and,
3 presumably, EEOC hopes, and the public and private interest CRD
4 represents, which are precisely the same public and private
5 interests that EEOC represents and seeks to vindicate in this
6 case, but assuming that those are vindicated in the CRD case,
7 what would be left for this Court to resolve in this case? The
8 adjudication of any individual's right to damages in the CRD
9 case would have a preclusive effect on EEOC's right to seek
10 damages on that individual's behalf.

11 THE COURT: Let's say CRD loses.

12 MR. HILL: Well --

13 THE COURT: Let's say CRD loses. What does Ernest
14 Bock tell us about that situation? If the state proceedings
15 will fully resolve -- and I'm not sure I agree with you anyway
16 about that even if they win -- but will fully resolve the
17 federal case only if the state rules in one of two ways,
18 Colorado River abstention is not appropriate. So deal with
19 that.

20 MR. HILL: Okay. I would like -- I'm happy to do
21 that, Your Honor. I want to make sure that you're satisfied as
22 to the resolution of anything in this court --

23 THE COURT: I'm not. EEOC is not bound by res
24 judicata. They're not bound. Maybe if an individual recovers
25 some damages, they can't double recover those damages, but

1 certainly in terms of injunctive relief or any individuals who
2 aren't -- don't recover, they could in this action, right?

3 MR. HILL: No, Your Honor, I don't believe that's
4 true. I think that the resolution of individual rights to
5 damages or not in the state court proceeding in phase two would
6 be preclusive with regard to EEOC's right to pursue damages on
7 behalf of those same individuals in this case. That's the EEOC
8 versus --

9 THE COURT: Okay. Right. I was saying if there are
10 different individuals. There may be additional individuals,
11 right?

12 MR. HILL: Correct, Your Honor, but the CRD case is
13 certainly as comprehensive -- it's actually more comprehensive
14 in scope and in terms of the individuals on whose behalf
15 individual relief would be pursued, as is this case is
16 currently --

17 THE COURT: What about injunctive relief?

18 MR. HILL: Okay. So with regard to injunctive
19 relief -- and I want to get to the flip side of this, what
20 happens if Tesla prevails -- but if EEOC prevails in terms --
21 I'm sorry, if CRD prevails in its claim for injunctive relief,
22 which CRD is pursuing based on the same prosecutorial powers
23 that EEOC has --

24 THE COURT: Different.

25 MR. HILL: -- and pursuing the same --

1 THE COURT: No, it's not the same. It's from the
2 state of California as opposed to the federal government.

3 MR. HILL: Certainly those powers are -- you know, the
4 source of the powers may be different, but the practical use of
5 the powers is the same. And if, in the injunctive relief that
6 CRD seeks is the same injunctive relief that EEOC has requested
7 in connection with this case, if injunctive relief is granted
8 to CRD, and, again, in a case that is set to be tried in less
9 than seven months, where the state court judge has made clear
10 that's a real date and to be respected by the parties, if an
11 injunction is entered, that may not have res judicata impact on
12 this court, but it certainly would likely negate the need and
13 thus the equitable justification for an injunction being issued
14 by this court. Why in the world would this court need to issue
15 an injunction with regard to practices and the like at Tesla's
16 Fremont plant when the state of California has already obtained
17 such an injunction.

18 Certainly the scope of the injunction entered by -- by
19 the state court in the CRD matter would influence, I would
20 anticipate, what this court believes is equitably justified --

21 THE COURT: I don't know.

22 MR. HILL: -- in terms of injunctive relief.

23 THE COURT: I don't know. I don't know. I have an
24 independent obligation.

25 MR. HILL: Again, Your Honor, I think it's highly

1 likely that you would consider the scope and bases for that
2 injunctive relief and why EEOC might need anything else.

3 I want to turn now to the question you asked about
4 what if Tesla prevails. I think preclusion is likely if Tesla
5 prevails in the CRD case, given the alignment of CRD's and
6 EEOC's --

7 THE COURT: Give me a case. That's a pretty -- that's
8 a pretty dramatic statement. Give me a case.

9 MR. HILL: Okay. Well, I --

10 THE COURT: I -- I -- give me a case that says the
11 federal government, a separate sovereign, is precluded by what
12 the state -- by the state of California's loss in state court.
13 Just give me a case.

14 MR. HILL: Well, I'll cite you to EEOC versus Frank's
15 Nursery & Crafts, Inc., that's at 177 F.3d 448, the jump cite
16 is 463. That's a Sixth Circuit case decided in 1999. In that
17 case the court states, quote, prior proceedings may bind a
18 nonparty as a privity where the nonparty's interests were
19 adequately represented by a party with the same interests in
20 the state court proceeding.

21 In fact, in the Sonoma Springs case, to cite you
22 another case, this case is cited in the parties' briefs --

23 THE COURT: Is the one that you just mentioned not
24 cited in your briefs, the Sixth Circuit case, because I don't
25 see it in your reply.

1 MR. HILL: That may not be -- that may be a new case,
2 Your Honor. That may be a case not cited in the briefs.

3 THE COURT: So not supposed to --

4 MR. HILL: You asked for one and I --

5 THE COURT: Well --

6 MR. HILL: -- I tried to --

7 THE COURT: -- you know what the local rules of this
8 court say is that they're all supposed to be in your briefs.

9 But are you telling me, are you telling me that in the
10 Sixth Circuit the Sixth Circuit held that the EEOC was in
11 privity with the state agency and therefore bound by --

12 MR. HILL: Your Honor, this has never happened before.
13 This is unprecedented. When has --

14 THE COURT: Well, I'll tell you, Rodney King. Rodney
15 King. The state brought charges, criminal charges against
16 those officers and they lost. And then the federal government
17 came in and did that, right? There is no privity, no double
18 jeopardy. This is not criminal, I understand, civil, even less
19 serious, so not exactly unprecedented.

20 MR. HILL: Your Honor, I'll confess, I'm not a legal
21 expert on the Rodney King case. I just saw what I saw on
22 television.

23 THE COURT: No, no, but you know -- maybe you don't
24 know -- that there was a state prosecution that was
25 unsuccessful, and that then the -- and then the United States

1 government came in and prosecuted the officers, the same
2 conduct, different statute.

3 MR. HILL: Your Honor, I would, you know, suggest
4 that, more to the point, is the question when has EEOC ever
5 before filed a lawsuit that is entirely duplicative of a
6 concurrent and well advanced state court matter brought by a
7 state agency with prosecutorial powers in a public mission that
8 mirrors those of EEOC, and, again, the answer appears to be
9 never.

10 THE COURT: I understand that your -- that Tesla
11 doesn't like that, but I'm a federal court and I have an
12 obligation to exercise my jurisdiction. You've asked for
13 Colorado River abstention, which you agree the Ninth Circuit
14 has made clear, any doubts are resolved in favor of going
15 forward. So you're sort of arguing the opposite, right.
16 You're saying, well, there is no precedent, hasn't happened, so
17 maybe there is a doubt, but that would -- that doesn't help me
18 in the sense -- in terms of giving me any authority to do so
19 here.

20 MR. HILL: I don't see -- you know, in Your Honor's
21 decision in Goodin versus Vendley, Your Honor -- Your Honor
22 notes that stays are routinely granted -- routinely is Your
23 Honor's word -- in FLSA cases pending the outcome of state
24 cases based on the same alleged facts brought under state law.

25 Your Honor also --

1 THE COURT: It was same -- same parties. All the
2 cases you cite in your reply, all of them, are where res
3 judicata would apply. All of them. Of course, right, in those
4 cases the plaintiffs are actually like splitting their claims
5 between federal court and state court for some strategic
6 reason, but should they prevail or even lose, there would be
7 res judicata. The federal action, as Bock said, would go away.
8 And so that's not this case.

9 MR. HILL: Bock isn't this case. Bock involved a
10 situation where the federal claims were -- where a binary
11 decision with regard to the enforceability of a guarantee
12 agreement had to be decided by the state court. If the state
13 court decided it one way, it would moot the federal claims, but
14 if it decided it another way, the federal claims would
15 necessarily have to go forward because they hadn't been pled in
16 the state court action.

17 This case is different. This case is, in fact, like
18 Goodin, where there is complete overlap between the federal
19 claims and the state claims and the factual allegations made in
20 support thereof, and where there is complete alignment between
21 the interest of the plaintiffs in the federal court -- of the
22 plaintiff in the federal court case and the plaintiff in the --
23 in the state court case. They have the same public interests.
24 They represent and seek to vindicate the same public interests
25 and the same private interests.

1 Those private interests, however resolved in the state
2 court matter, will have preclusive effect as to the individuals
3 involved in connection with this -- with the federal court
4 proceeding, and a resolution of the -- of the request for
5 injunctive relief of the public interest pursued in the CRD
6 case will very much impact this Court's consideration of
7 whether an injunctive is appropriate in this case.

8 THE COURT: Okay. Let me -- let me now hear from
9 Mr. Baker.

10 MR. BAKER: I think Bock is pretty straightforward
11 that you have to be done here, should the Court issue a stay,
12 and not need to return. In Bock there were only one or two
13 scenarios where that would be the case. There is so much
14 uncertainty in the state cases, most importantly, the fact that
15 the EEOC is not a party to either, that there is no resolution
16 in the CRD or Bock case that would necessarily resolve the
17 EEOC's case, at least none that is apparent at this stage in
18 the lawsuit.

19 And there are a lot more ways that those two state
20 cases could resolve themselves than was present in Bock. I
21 mean, ruling for one entity not the other; a ruling on the
22 class action; a motion to certify the class; individual
23 adjudication of claims and separate phase, et cetera, et
24 cetera, none of which necessarily resolves the EEOC's case.

25 Now, to be clear, there could be some impact in terms

1 of damages of an individual level after the EEOC has
2 established liability, but there is no res judicata. The EEOC
3 would not be named in any judgment, and that alone is not
4 enough to eventually abstain from hearing the federal
5 government's case in the only forum that the federal government
6 has sought to enforce its rights against Tesla in.

7 THE COURT: Okay.

8 MR. HILL: Your Honor, I just want to, you know,
9 again, and as Your Honor states yourself in the Goodin
10 decision, you know, Colorado River cases are to be decided in a
11 pragmatic and flexible way. There is no off/on switch. There
12 is no black and white issue that resolves a Colorado River stay
13 motion.

14 There are no Ninth Circuit cases, or cases within the
15 Ninth Circuit that say a state court -- the resolution of the
16 state court matter must result in res judicata preclusion in
17 the federal case --

18 THE COURT: What Bock says is parallelism is necessary
19 but not sufficient to counsel in favor of abstention.
20 Parallelism doesn't exist here and parallelism in Bock is
21 necessary.

22 MR. HILL: I think that what Bock says expressly is
23 that exact parallelism is not required, that the parties and
24 that the claims need not be exactly the same. And what Bock
25 clearly does not say is that the resolution of the state court

1 proceeding must have res judicata impact on the federal court
2 proceeding or a Colorado River stay is inappropriate. Bock
3 does not say anything --

4 THE COURT: Doesn't say res judicata but it says it
5 must fully resolve it. And you conceded if Tesla wins --
6 even -- even if I accept your arguments about if CRD wins, all
7 of them, even if I accept all of that, if Tesla wins, it
8 doesn't resolve this case at all, and the EEOC can proceed on
9 behalf of the same individuals on everything. And that's
10 exactly where Bock was, where there was one outcome that would
11 fully resolve it, and one outcome that would not. And the
12 Ninth Circuit said, therefore, Colorado River abstention was
13 not appropriate.

14 MR. HILL: I think that, Your Honor, I have not said
15 that the EEOC case can proceed if Tesla is -- is successful in
16 the state court matter. That's something that depends on the
17 resolution of the state court matter. Certainly there --

18 THE COURT: Okay. Okay. Stop. Stop. We'll just
19 stop. I think I have heard enough. I think -- I understand
20 the argument. I think it runs square into -- square into Bock,
21 square into Bock.

22 So let's move to the second argument, and I don't know
23 if you're going to do that one as well or one of your
24 colleagues.

25 MR. HILL: Mr. Cardozo is --

1 THE COURT: Not the dismiss, the second argument you
2 had for the stay.

3 MR. HILL: Oh, that's right, Your Honor. Thank you.

4 THE COURT: Good morning. There I think you're
5 running into another case, which is that the Supreme Court in
6 Mach -- is it Mach Mining -- Mach Mining, said there is no good
7 faith requirement with respect -- now I'm not saying that EEOC
8 is met in bad faith, but that is almost essentially what you're
9 arguing -- that there is no good faith requirement for that
10 pre-litigation process, right?

11 MR. HILL: I don't think that we've argued that there
12 needs to be -- I don't think we've made a good faith argument.
13 I think what Mach Mining makes clear is that the EEOC's
14 pre-conciliation obligation is more than a perfunctory, go
15 through the motions, check the box administrative piffle. At
16 minimum, EEOC must provide an employer it accuses of
17 discrimination information sufficient to give the employer an
18 opportunity to remedy the discriminatory practice. That's
19 right from Mach Mining.

20 This means that EEOC must tell the employer what's --
21 what it has done wrong and who it has harmed. EEOC never gave
22 Tesla this information. It refused to do so despite Tesla's
23 repeated request. Instead EEOC simply provided Tesla
24 conclusory and fact-free findings of --

25 THE COURT: Let me stop you for one second. You just

1 argued to me that there is nearly complete overlap between the
2 state and federal cases and the state case is going to trial in
3 seven months. So as Tesla sits here today, it knows the EEOC's
4 case, because you told me there is nearly complete overlap, so
5 much so that resolving that state case will resolve this case,
6 so Tesla actually knows.

7 MR. HILL: The Mach Mining decision and the
8 conciliation obligation is a pre-suit obligation.

9 THE COURT: Okay. That's fine. I just want to make
10 it clear then. This is not Tesla actually claiming we actually
11 don't know. We do know. We do know. We just want you to,
12 what, dismiss and then have them re-file? I mean, if we're
13 talking about practical -- I want to figure out exactly what
14 Tesla is asking me to do, have them dismiss, have them meet and
15 something that -- no resolution will come, because you -- Tesla
16 actually knows what they're claiming now, and it's the same as
17 the state case, and there has been no resolution -- just so
18 they could file again and will be here again in three months?
19 Is that it?

20 MR. HILL: No, Your Honor.

21 THE COURT: Okay.

22 MR. HILL: I think Tesla wants exactly what the
23 Supreme Court granted the employer in Mach Mining, which is a
24 stay of the proceedings to allow the EEOC to comply with the
25 legal obligation that it had before filing this lawsuit, which

1 was to conciliate with Tesla and give Tesla the opportunity to
2 remediate the issues that EEOC believes to exist once EEOC has
3 identified those issues, the wrongdoing, and the victims.

4 THE COURT: Let me hear from the EEOC then.

5 MS. CADOR: Sure. So Mach Mining does direct that the
6 EEOC need to inform the employer of the allegation, identify
7 which employees or class of employees have been harmed, and
8 engage in discussion with the employer. And the EEOC in this
9 case most certainly did all of those things.

10 Regarding the information of the allegation, EEOC
11 complied by expressly notifying Tesla through its
12 predetermination interview and letter of determination that the
13 EEOC had uncovered evidence of Tesla's violation of Title VII,
14 specifically, that Tesla subjected a class of black employees
15 to a hostile work environment, and retaliated against a class
16 of black employees who engaged in protected activity at the
17 Fremont facility.

18 Regarding the class of employees who suffered, EEOC
19 complied with this factor when it explicitly identified black
20 employees who were employed at Tesla's Fremont facilities at
21 anytime from May 29th, 2015. And regarding the engagement and
22 discussion with Tesla, EEOC complied with this factor first
23 when it unambiguously invited Tesla to participate in the
24 informal conciliation with the EEOC; and, second, when it did,
25 in fact, participate in those conciliation efforts, which

1 included a seven-hour in-person conciliation and a proposal for
2 resolution of the matter.

3 THE COURT: The EEOC made a proposal for resolution?

4 MS. CADOR: We did.

5 MR. HILL: Your Honor, this is what the EEOC told
6 Tesla: You've discriminated and harassed black employees at
7 your Fremont plant since at least 2015. The victims of your
8 discrimination and harassment are the employees who have
9 experienced discrimination and harassment. Fix the
10 unidentified problem and make the unidentified victims whole.
11 Go.

12 THE COURT: Am I supposed to have a trial, right, as
13 to like -- what is the standard here on this -- this
14 requirement, right? I mean, we're sort of getting into the
15 weeds. Am I supposed to -- and there is no good faith
16 requirement. You're arguing that they -- that it wasn't in
17 good faith. I mean --

18 MR. HILL: Your Honor.

19 THE COURT: -- there is no good faith requirement.

20 MR. HILL: The requirement is -- is, I think, clearly
21 articulated in Mach Mining, and that is that information
22 sufficient to give the employer an opportunity to remedy the
23 discriminatory practices must be provided pre-suit.

24 EEOC failed to identify any specific victims or
25 perpetrators of discrimination or harassment, or specific dates

1 of such misconduct within an eight-year period, or the specific
2 departments or other work locations where the misconduct
3 allegedly occurred. Without that information, how could Tesla
4 possibly have had the pre-suit opportunity to remedy its
5 alleged discriminatory practice.

6 THE COURT: And the case you're relying on is Mach
7 Mining?

8 MR. HILL: Correct.

9 THE COURT: Okay. All right. That's fine.

10 Did you want to say anything further?

11 MS. CADOR: Just to add that it appears that Tesla
12 might be conflating the mandate to provide employers with
13 specific allegations with the proviso of specific details
14 underlying the allegation. The EEOC did, in fact, lay out the
15 specific allegations, the violation of Title VII, by
16 maintaining a workplace that was -- created a hostile work
17 environment for black employees at the Fremont facility.

18 THE COURT: Okay. All right. Thank you.

19 MR. HILL: Your Honor, I'll just say that I'm not
20 playing games with anything. The language I quoted to Your
21 Honor comes right out of the Mach Mining decision.

22 THE COURT: No, no, no, I understand, but because as I
23 was looking again at your reply, there are no cases, pretty
24 much just Mach Mining, so you're relying on Mach Mining?

25 MR. HILL: We are relying on Mach Mining, which we

1 think is, in fact, as dispositive on this issue as Your Honor,
2 apparently, feels Bock is on the first issue.

3 THE COURT: I'll go back and look again. All right.
4 Thank you.

5 MS. CADOR: Thank you, Your Honor.

6 THE COURT: Okay. Motion to dismiss.

7 MR. CARDOZO: Thank you, Your Honor. Ray Cardozo from
8 Reed Smith.

9 The fundamental problem with the lack of specificity
10 in this complaint is very similar and related to the problem
11 you were just hearing argument about. And I want to start with
12 what a fundamental perversion it is of what the statute seeks
13 to accomplish.

14 If the goal is to solve the problem without litigation
15 first in the administrative process by giving Tesla particulars
16 so it can figure out is there someone -- because Tesla's
17 terminating people for misconduct throughout all of this. Do
18 we still have a problem? Are there particular hotspots at the
19 factories? What is the nature of the problem here? You've
20 heard our argument about why that didn't happen, didn't even
21 come close to happening.

22 But now we get a pleading and we still don't get it.
23 This pleading literally says it's everywhere in the factory
24 going back to 2015 and it involves everyone.

25 Now, as Your Honor pointed out, we have a case going

1 in state court to trial in seven months. We know unequivocally
2 that that's not true because we have hundreds of declarations
3 in that case from people who have said they have experienced
4 nothing of the sort and they're thriving at Tesla. So how in
5 the world can Tesla take this complaint and understand what
6 it's being charged with, whether there are particular problems
7 that need rectifying or so on? There is a lot of flexibility
8 on the pleading standard for an EEOC pattern and practice case,
9 obviously, a lot. And the cases we cite sort out the
10 difference of what makes the grade and what doesn't. What this
11 does, it goes beyond anything that's ever passed muster, and
12 clearly flunks the test of those that have dismissed pattern
13 and practice cases.

14 THE COURT: Do you have an appellate case to support
15 your argument?

16 MR. CARDOZO: We don't. And this case is one of a
17 kind. I have never seen a complaint like this that says
18 everything, everywhere, all at once, the whole thing. There is
19 no case that's analyzed --

20 THE COURT: So why is that implausible?

21 MR. CARDOZO: Why is that implausible? Well --

22 THE COURT: Why is that implausible? I mean, it says
23 it's essentially pervasive. You're not going to argue it's not
24 severe. You're not going to argue based on these allegations
25 it's not severe, and it says it's pervasive throughout the

1 facility and has been since 2015. That's the allegation that I
2 accept as true. Why is that not plausible, because that's the
3 standard I'm applying, 12(b)(6), Iqbal/Twombly.

4 MR. CARDOZO: And notice and sufficiency.

5 THE COURT: Why is that not plausible?

6 MR. CARDOZO: Well, I think it is plausible that every
7 single person the whole time everywhere that it happened, how
8 would the company survive since 2015 if that were true?

9 THE COURT: You want me to draw inferences in Tesla's
10 favor then?

11 MR. CARDOZO: No. Iqbal and Croft, they both say
12 plausibility does have its part of it in assessment of the
13 plausibility of what's being alleged. And you -- when you have
14 an allegation that's just as over the top as that, that's where
15 Iqbal and Twombly changed the prior law and said, yeah, you can
16 apply a plausibility lens.

17 THE COURT: It is over the top. It does allege pretty
18 extreme hostile environment. Why is that implausible? As a
19 matter of law, why can't I accept those allegations as true?

20 MR. CARDOZO: I think because you just apply the plain
21 definition of plausibility. And when someone is saying that
22 every single person, none of the race, in 20 -- from 2015 to
23 2024, discriminated against every single person --

24 THE COURT: That's not what it's saying.

25 MR. CARDOZO: It comes pretty close to saying that.

1 THE COURT: That's not what it's saying. It's saying
2 that this racism, the use of the N word, was ubiquitous
3 throughout the facility, not every minute, every time, but it
4 was ubiquitous, such that it created a hostile environment for
5 the black workers in the facility. That's how I interpret the
6 allegations of the complaint. Now, may be untrue, right, may
7 be untrue, this is just the allegations, but what I don't know
8 is why that doesn't state a claim.

9 MR. CARDOZO: Because the plausibility element has to
10 also meet the sufficiency and the -- some factual particulars.
11 Because how can we even say if that's plausible or not if we
12 don't have a single -- there is not a single person, place, or
13 time identified. There is not a single individual --

14 THE COURT: There is time.

15 MR. CARDOZO: There is a time, it's 2015 --

16 THE COURT: There are lots of cases that say the EEOC,
17 when they're bringing in the complaint in their own name and
18 not on behalf of an individual, do not have to name an
19 individual, right. There are lots of cases that do that.

20 A lot of the cases that you cite involve issues like,
21 hey, they're not -- they're being brought on behalf of an
22 individual, or they involve issues like statute of limitations
23 problems or other things like that that there were specific
24 ones.

25 What's your best case? Tell me the case you want

1 me -- we're only talking about district court cases, so best,
2 it's persuasive.

3 MR. CARDOZO: The best case, pattern and practice
4 case, is a case called Cazorla versus Koch Foods. And I would
5 actually recommend the EEOC versus JBS USA case, which we cited
6 in our papers, because it does an analysis and it explains the
7 difference between Cazorla, which says it's not sufficient, and
8 an EEOC versus UPS case which is sufficient in a pattern and
9 practice not sufficiently particularized. It contrasts the
10 two.

11 And if you look at what they say is the difference,
12 what -- why one was sufficient and one wasn't, Cazorla is
13 talking about this case, absent any particularized facts, the
14 complaint failed to state a claim for a hostile work
15 environment or retaliation, as the 111 newly added class
16 members was too generic -- a case that passed muster -- the
17 EEOC's complaint alleged specific facts with respect to two
18 identified charging parties, and then it said it's similar for
19 the rest of the class. So you had a model, a template about
20 two individuals in there.

21 The case goes on to talk about things that make it
22 qualify that are missing from Cazorla: The names of the
23 aggrieved parties. There are no names in this; the basis upon
24 which the aggrieved parties were alleged to have discriminate,
25 the types of conduct; the identity of the alleged perpetrators.

1 The things that the case law talks about, what makes it
2 sufficient from not sufficient, pattern and practice EEOC
3 claim, we don't have here.

4 THE COURT: Okay. So tell me, Mr. Baker, about this
5 case from Mississippi, Cazorla, and the case from Colorado,
6 JBS, those are the two you're referring to, is that right,
7 those are the two best cases you said I should follow?

8 MR. CARDOZO: Yeah. I'll throw in the Hannah case
9 from the District of Hawaii, 2021 -- 2012, I'm sorry.

10 THE COURT: Well, the Hawaii one was the one where
11 they needed allegations because there was a different
12 defendant, and the timing was important as to whether there was
13 a plausible claim against that defendant, right?

14 MR. CARDOZO: Yeah. I'm referring to the part of the
15 decision that says the complaint offers little information
16 regarding the identity of the alleged hassles. The complaint
17 refers collectively to defendant employers.

18 THE COURT: Okay. I can read it. I can read it.

19 MR. CARDOZO: So it's the collective references and
20 the lack of names.

21 THE COURT: All right. It is the one I thought.

22 Mr. Baker.

23 MR. BAKER: Interesting about Cazorla is that the
24 Court decided the motion to dismiss several years into the case
25 after the parties had engaged in discovery. In fact, in one of

1 the scheduling orders the Court had ordered the EEOC to
2 identify victims, which the EEOC did and amended its complaint,
3 and then the defendant moved to dismiss there.

4 Cazorla does not stand for the idea that the
5 commission needs to do all these things before discovery to
6 survive a 12(b)(6) motion. If anything, it says, yeah, at some
7 point Tesla is going to have the right to test the sufficiency
8 of the allegations to identify the victims. That's what
9 discovery is for. Nothing in Cazorla says that happens at the
10 onset of the lawsuit. And I think in Cazorla it was three
11 years in since the -- since the case was filed.

12 And JBS USA, I think -- the other case my counterpart
13 named -- the Court entertained a motion to dismiss and a motion
14 for judgment on the pleadings after discovery and trial was
15 held in phase one of the EEOC's case, which makes sense. They
16 discovered victims and claimants and narrowed the theory of
17 liability for the trial. And this was before phase two.

18 None of this suggests that the commission needs to do
19 that at the onset of the case to put Tesla, which is something
20 of a legal fiction here, on notice of the allegations against
21 it. And the complaint as pled right now alleges more than
22 enough facts to raise, as Twombly says, an expectation that
23 discovery will reveal the evidence of the necessary claims or
24 elements. That's all in the complaint.

25 Naming one more, two more individuals, notwithstanding

1 the fact that we are bringing the case on our own initiative,
2 does not make the case more or less meaningfully plausible with
3 respect to the nature of the allegations here. It would be an
4 exercise that has no practical utility.

5 Tesla is on notice of the allegations from the
6 complaint. It's sufficient. We need to get to discovery
7 where, you know, we meet and confer about victims, their first
8 rog is identify victims, et cetera, et cetera. The 12(b)(6)
9 process is not to stop a complaint like this, that is, as
10 sufficient as this one is.

11 THE COURT: All right. He's right about Cazorla. The
12 decision came three years after the case was filed.

13 MR. CARDOZO: Yes, but the case says it's applying
14 Rule 12(b)(6) --

15 THE COURT: And it's only as persuasive as it is
16 persuasive, because, as you conceded, there is no appellate
17 authority, right, that you're relying on. You're relying
18 solely on district court cases, and so they're only as
19 persuasive and they're persuasive.

20 And, in this case, as you pointed out, and as your
21 colleague said, there is complete overlap with the state case.
22 So it is a little bit of the fiction. Tesla isn't complaining
23 that they actually don't know what they're talking about. You
24 just showed me the complaint and have them amend to allege.
25 And you may -- you know, the question is it is plausible or not

1 but --

2 MR. CARDOZO: Well, I'll come back to -- the EEOC is,
3 unlike other private plaintiffs, the EEOC is required by
4 statute before they even come to this court to give notice,
5 investigate, and conciliate. So the idea that we're early,
6 they're supposed to have done a lot before they got here, and
7 they can't tell us one fact. And --

8 THE COURT: They told you a lot of facts. They gave
9 specific examples of the conduct that they allege -- that they
10 allege is occurring throughout the facility and has been.
11 They're not just saying discrimination. They're saying -- and
12 they're actually saying specifically what it is -- what is the
13 conduct that created the hostile environment. It's based
14 primarily on the use of language and words, or a particular
15 word throughout the facility. That's what it is. That's what
16 the notice is. So you even know exactly what is the type of
17 the hostile work environment. It's not even like they're --
18 it's not saying what that is. It is saying what it is.

19 MR. CARDOZO: Well, I'll say a couple of things. The
20 appellate cases made very clear that there is certain standards
21 that Rule 12(b)(6) has to have. So that's established.

22 These district court cases are the only ones that
23 address this very odd circumstance where complaints are
24 unusually generic. And the standards -- the few cases that
25 have applied to sift what makes it sufficient from what

1 doesn't, they all talk about things that just aren't present in
2 this complaint: Who the perpetrators are, names, who the
3 victims are, and other specifics.

4 Because if you think about what the statute is
5 supposed to accomplish, particularly if you didn't get that in
6 the administrative process either, this is so far from what
7 Title VII is contemplating --

8 THE COURT: But look at paragraph 22. That is a very
9 specific allegation, which in and of itself supports a claim of
10 a hostile work environment for that employee, that you don't
11 know his name doesn't mean it's not plausible. Just do your
12 interrogatory and get it.

13 MR. CARDOZO: We don't know, not only the name, but
14 whether this has happened in 2015 or 2024, which I --

15 THE COURT: Why does it matter? Why does --

16 MR. CARDOZO: Because one might be a problem that
17 requires correction, one might be a one-off, one might be one
18 where the person got fired. All of these things we need to
19 know.

20 THE COURT: That's what discovery is for. The
21 question is does it state a claim? The question is does is
22 state a claim? You said it was generic. I'm looking at
23 paragraph 22. There is nothing generic about that allegation.

24 MR. CARDOZO: But the allegation in this complaint is
25 not about one worker. They're saying it's happening

1 everywhere. And then they throw in one worker --

2 THE COURT: I understand. I understand. I'm not
3 persuaded at all, I have to say -- I don't think that's a
4 secret -- and, you know, there isn't really a lot of support
5 for it.

6 Look, if they don't give you discovery, then come
7 complain, but they'll give it to you. You'll get it. You'll
8 know, and the evidence will --

9 MR. CARDOZO: But they didn't give it before we came
10 to court and they're required by law to do that.

11 THE COURT: This is not helpful. It's not helpful and
12 it's not persuasive.

13 All right. We're dealing with the motion to dismiss,
14 and I'll address the one that your colleague made. All right.
15 And I apply the law and I'll do it faithfully here so -- and
16 I'll issue a written order. You can go back and look at that.

17 So I will do -- we don't have a CMC date, so I want to
18 set the date for May 9th, and then you'll need to meet and
19 confer.

20 One thing, I do want to try to reduce the burden of
21 discovery as much as possible in light of the state court
22 proceedings. One way to start, which you should discuss, is
23 Tesla just produce what it's already produced, that you review
24 that, and then only if there is additional things that you need
25 or have been withheld, that you do that to reduce the burden.

1 That would be my suggestion as a good way of starting.

2 I don't think it's probably too late to coordinate
3 depositions or things like that, and it may be that the parties
4 won't. I don't know. To the extent you can do that, that's
5 also something to explore as well.

6 Again, we have to be mindful of Rule 1, which is to
7 try to be as efficient and inexpensive as possible. So those
8 are things you should discuss when you have your Rule 26
9 colloquy.

10 All right. So that would be May 9th, by video is how
11 I do the CMCs. They'll be 1:30. And your joint statement is
12 due May 2nd.

13 All right. Thank you.

14 MR. CARDOZO: All right. Thank you, Your Honor.

15 (Proceedings concluded at 11:22 a.m.)

16 * * *

C E R T I F I C A T E

I, CHRISTINE M. COALY, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 22nd day of April, 2024.

/s/ Christine M. Coaly
Christine M. Coaly, RMR, CRR